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Lee May Ling v Public Prosecutor

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HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NOS 42(S)-68–06 OF 2016 AND 42(H)-80–06 OF 2016
INDERA MOHD SOFIAN J
12 OCTOBER 2018

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Criminal Law — Sedition Act 1948 — Section 4 — Appellant convicted for offence of publishing seditious statements — Appeal against conviction and inadequacy of sentence — Whether seditious statement published by appellant — Whether impugned statements seditious — Whether imprisonment sentence appropriate — Sedition Act 1948 s 4(1)(c) — Penal Code s 34

D

Criminal Procedure — Trial — Joint trial — Appellant charged under Sedition Act 1948 and Film Censorship Act — Whether joint trial would be in interest of justice — Criminal Procedure Code ss 163, 170 & 422

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The appellant filed the present appeal against the decision of the learned sessions court judge ('SCJ') who found the appellant guilty for an offence under s 4(1)(c) of the Sedition Act 1948 ('the Act') and sentenced to an imprisonment term of five months and 22 days from 27 May 2016. There was also a cross appeal by the prosecution against the inadequacy of sentence meted out by the learned SCJ. The appellant in the present appeal was charged for an offence for posting photograph on Facebook showing two individuals with the words 'selamat berbuka puasa with Bak Kut Teh' and contained the logo Halal as well as the words underlined by the prosecution in the annexure of the charge. Initially, the appellant, was jointly charged with another co accused, named Tan Jye Yee, however in the midst of the trial when the case was adjourned and then resumed, Tan Jye Yee had absconded. The appellant submitted that: (a) the factual matrix of the two joint charges under s 4(1) of the Act and s 5(1) of Film Censorship Act 2002 differed materially and they did not fulfill the requirement under s 170 of the Criminal Procedure Code ('the CPC') or s 163 of the CPC; (b) the prosecution had to prove that there had been a publication on the Facebook page entitled 'Alvin and Vivian-Alviv' on the morning of 12 July 2013; (c) there was no evidence that the Facebook greeting was published or uploaded by the appellant or by Tan Jye Yee; and (d) there was no evidence from any of the prosecution's witnesses that: (i) the Facebook publication had any tendency to raise any discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or the inhabitants of Malaysia or of any State; or (ii) the Facebook publication had any tendency to

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promote feelings of ill-will or hostility between the different races or classes of population in Malaysia.

Held, dismissing the appeal on conviction and affirming the decision on conviction by learned SCJ and setting aside the sentence of imprisonment and substituting it with a maximum fine of RM5,000 in default of six months imprisonment:

(1) The court was of the view that even if the two charges were wrongly heard jointly, so long as the appellant was not prejudiced by the conduct of the case, the court could invoke s 422 of the CPC in that if the joint trial was irregular, it did not vitiate the trial unless such irregularity occasioned a miscarriage of justice. In the instant case, the court failed to see that there was a miscarriage of justice. The appellant was represented by counsel and the appellant was not misled by having the two charges heard together (see para 8).

(2) The court was of the considered view that although no one saw Tan Jye Yee or the appellant published or uploaded the Facebook greeting but from the testimonies of the prosecution witnesses all pointed to the fact that the photographs were kept in the file in the notebook Samsung belonging to Tan Jye Yee and the Facebook account was registered in names of Tan Jye Yee and the appellant. The necessary inference which could be drawn from the evidence by the prosecution witnesses that the publication was done by Tan Jye Yee and the appellant. There was sufficient evidence from the surrounding circumstances that Tan Jye Yee and the appellant had the common intention to publish the impugned Facebook greetings (see paras 13 & 15).

(3) The court was of the opinion that the publication had a seditious tendency to promote ill-will and hostility between the races or classes of the population of Malaysia. The evidence showed that the publication had caused feelings of ill-will or hostility between the different races or classes of population in Malaysia. This was evident from the testimonies of prosecution witnesses who expressed their anger, frustration, hurt, regret on the action by Tan Hye Yee and the appellant (see para 21).

(4) The court was of the opinion that an appropriate sentence for the appellant was a maximum fine of RM5,000 taking into account that the appellant was a first offender as far as the charge was concerned. The court would tamper justice with mercy by setting aside the imprisonment sentence and substituting it with a maximum fine of RM5,000 in default six months imprisonment (see para 27).

[Bahasa Malaysia summary

Perayu memfailkan rayuan ini terhadap keputusan hakim mahkamah sesyen ('HMS') yang mendapati perayu bersalah kerana kesalahan di bawah s 4(1)(c)

Akta Hasutan 1948 ('Akta') dan menjatuhkan hukuman penjara untuk tempoh lima bulan dan 22 hari dari 27 Mei 2016. Terdapat juga rayuan balas oleh pendakwaan terhadap hukuman yang tidak mencukupi yang dijatuhkan oleh HMS yang bijaksana. Perayu dalam rayuan ini telah dituduh kerana kesalahan memposkan gambar foto di Facebook menunjukkan dua individual dengan perkataan-perkataan 'selamat berbuka puasa with Bak Kut Teh' dan mengandungi logo Halal dan juga perkataan-perkataan yang digariskan oleh pendakwaan dalam lampiran pertuduhan itu. Pada mulanya, perayu, telah dituduh bersama dengan tertuduh bersama yang lain, bernama Tan Jye Yee, walau bagaimanapun semasa perbicaraan apabila kes ditangguhkan dan kemudian disambung semula, Tan Jye Yee telah melarikan diri. Perayu telah berhujah bahawa: (a) matriks faktual dua pertuduhan bersama di bawah s 4(1) Akta dan s 5(1) Akta Penapisan Filem 2002 adalah berbeza secara material dan tidak memenuhi keperluan di bawah s 170 Kanun Tatacara Jenaya ('KTJ'); (b) pendakwaan telah membuktikan bahawa terdapat penerbitan di halaman Facebook bertajuk 'Alvin and Vivian-Alvin' pada pagi 12 Julai 2013; (c) tiada keterangan bahawa ucapan Facebook telah diterbitkan atau dimuatnaik oleh perayu atau oleh Tan Jye Yee; dan (d) tiada keterangan daripada mana-mana saksi pendakwaan bahawa: (i) penerbitan Facebook itu mempunyai sebarang kecenderungan untuk menimbulkan apa-apa ketidakpuasan dan rasa tidak puas hati di kalangan subjek-subjek Yang di-Pertuan Agong atau penduduk di Malaysia atau mana-mana Negeri; atau (ii) penerbitan Facebook mempunyai apa-apa kecenderungan untuk mewujudkan perasaan niat jahat atau permusuhan antara kaum atau kelas penduduk berbeza di Malaysia.

Diputuskan, menolak rayuan atas sabitan dan mengesahkan keputusan atas sabitan oleh HMS yang bijaksana dan mengetepikan hukuman penjara dan menggantikannya dengan denda maksimum RM5,000 jika gagal enam bulan penjara:

(1) Mahkamah berpendapat bahawa walaupun dua pertuduhan tersebut tersalah dengar bersama, selagi perayu tidak diprejudiskan oleh perjalanan kes, mahkamah boleh menggunakan s 422 KTJ di mana jika perbicaraan bersama tidak teratur, ia tidak melemahkan perbicaraan kecuali luar aturan tersebut mengakibatkan keadilan tidak dapat dilaksanakan. Dalam kes ini, mahkamah gagak melihat telah berlaku apa-apa ketidakadilan. Perayu yang diwakili oleh peguam dan perayu tidak dikelirukan dengan dua pertuduhan yang dibicarakan bersama (lihat perenggan 8).

(2) Mahkamah mempunyai pandangan yang dipertimbangkan bahawa meskipun tiada sesiapa melihat Tan Jye Yee atau perayu menerbitkan atau memuatnaik ucapan Facebook itu tetapi daripada testimoni saksi-saksi pendakwaan kesemuanya menunjuk kepada fakta bahawa gambar foto tersebut telah disimpan dalam fail dalam notebook Samsung yang dimiliki oleh Tan Jye Yee dan akaun Facebook yang didaftarkan atas

nama Tan Jye Yee dan perayu. Inferens yang perlu boleh dibuat berdasarkan keterangan oleh saksi-saksi pendakwaan bahawa penerbitan itu telah dilakukan oleh Tan Jye Yee dan perayu. Terdapat keterangan mencukupi daripada keadaan persekitaran bahawa Tan Jye Yee dan perayu mempunyai niat bersama untuk menerbitkan ucapan Facebook yang dipersoalkan itu (lihat perenggan 13 & 15).

(3) Mahkamah berpendapat bahawa penerbitan itu mempunyai kecenderungan yang bersifat hasutan untuk mewujudkan niat jahat atau permusuhan di kalangan kaum dan kelas penduduk yang berbeza di Malaysia. Ini adalah jelas daripada testimoni-testimoni saksi-saksi pendakwaan yang menyatakan rasa marah, kecewa, sakit hati dan kesal akibat tindakan oleh Tan Jye Yee dan perayu (lihat perenggan 21).

(4) Mahkamah berpendapat bahawa hukuman sesuai untuk perayu adalah denda maksimum RM5,000 dengan mengambil kira bahawa perayu adalah pesalah kali pertama setakat mana pertuduhan itu adlah berkaitan. Mahkamah akan campur tangan demi keadilan dengan mengetepikan hukuman penjara tersebut dan menggantikannya dengan denda maksimum RM5,000 jika gagal penjara enam bulan (lihat perenggan 27).]

Notes

For a case on s 4, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) para 4164.
For cases on trial in general, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3319–3321.

Cases referred to

Mat Shuhaimi bin Shafiei v PP [2014] 2 MLJ 145; [2014] 5 CLJ 22, CA (refd)

Legislation referred to

Criminal Procedure Code ss 163, 170, 422
Film Censorship Act 2002 s 5(1), (1)(c)
Penal Code s 34
Sedition Act 1948 ss 2, 3(1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f), 4(1)(c)

Chong Joo Tian (TJ Chong Assoc) for the appellant.
Wan Shaharudin bin Wan Ladin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Indera Mohd Sofian J:

[1] This appeal is by the appellant, Lee May Ling against the decision of the learned sessions court judge, Kuala Lumpur ('the learned SCJ') meted out whereby the appellant was found guilty for an offence under s 4(1)(c) of the

Sedition Act 1948 and sentenced to an imprisonment term of five months and 22 days from 27 May 2016. There is also a cross-appeal by the prosecution against the inadequacy of sentence meted out by the learned SCJ.

[2] Amended charge:

> Bahawa kamu bersama-sama diantara 12.7.2013 jam lebih kurang 9 pagi di pautan https://www.facebook.com/photophp?Fbid+=617457598272144&set=a.512860642065174.123291.509820495702522&type=1&theatre dengan niat bersaama telah menerbitkan satu penerbitan menghasut di laman muka buku (facebook) 'Alvin and Vivian-Alvivi' iaitu satu kandungan gambar dan komen iaitu kandungan gambar dan komen yang bertajuk 'selamat Berbuka Puasa (dengan Bak Kut Teh.wangi,enak, meyelerakan!!!' yang mengandungi logo Halal (kandungan sepenuhnya dilampirkan bersama peertuduhan ini sebagai Lampiran 'A' dan ayat-ayat yang mempunyai kecederungan menghasut digariskan) yang mana penerbitan tersebut telah dibaca oleh Mohammad Fakhri bin Mansor di Bahagian Kandungan Komunikasi Dan Perkhidmatan Pos, Kementerian Komunikasi dan Multimedia Malaysia, Presint 4, Putrajaya dan oleh yang demikian, kamu telah melakukan satu kesalahan dibawah subseksyen 4(1)(c) Akta Hasutan 1948 (Akta 15) yang boleh dihukum di bawah subseksyen 4(1) Akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.

[3] Section 4(1)(c) states as follows:

> (1) Any person who:
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> ...
>
> (c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication;
>
> shall be guilty of an offence and shall, on conviction be liable for a first offence to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or both and for subsequent offence

[4] On 10 April 2018, the court heard the appeal and after perusing the appeal record and reading the written submissions and hearing further oral submissions from both parties, dismissed the appeal on conviction but substituted the sentence of five months and 22 days imprisonment with a fine in the sum of RM5,000 in default, imprisonment of six months. The court in the same vein dismissed the prosecution's appeal on inadequacy of sentence. Both the parties were disenchanted with the said decision and have since filed respective notice of appeal at the Court of Appeal against conviction and sentence.

A OBSERVATION BY THE COURT

[5] The court observed that the appeal was against the amended charge pursuant to s 4(1)(c) of the Sedition Act 1948 and read together with s 34 of the Penal Code. Initially the appellant was jointly charged with another co-accused, named Tan Jye Yee, however in the midst of the trial when the case was adjourned and then resumed, Tan Jye Yee had absconded. The trial resumed in the absence of Tan Jye Yee. Until the conclusion of the trial, Tan Jye Yee was absent. The court found that the notice of appeal by the appellant was against conviction and sentence whereas the appeal by the prosecution was against adequacy of sentence. Both appeals were for the charge pursuant s 4(1)(c) of the Sedition Act 1948 and not against s 5(1) Film Censorship Act 2002. The learned SCJ nevertheless in his judgment at pp 63–64 of the appeal record Vol 1 had discussed the ingredients of the offence under s 5(1)(c) of the Film Censorship Act 2002 which was not relevant. The learned SCJ need not discussed the ingredients of the offence under s 5(1)(c) of the Act since there was no appeal by the prosecution against the acquittal and discharged of the appellant at the end of the prosecution's case.

[6] One of the many issues raised by the counsel in this appeal, was the fact that the charge under s 4(1)(c) of the Sedition Act and the charge under s 5(1) of the Film Censorship Act were jointly tried. Learned counsel argued that the factual matrix of the two charges differed materially and they did not fulfil the requirement under s 170 of the Criminal Procedure Code ('the CPC') or s 163 of the CPC.

[7] The prosecution in its submission did not touch on this issue at all and for the learned SCJ, it was stated that the order for the joint trial of the two charges was made by the previous learned SCJ and the learned SCJ who heard the matter as they were based on the decision of the earlier ruling made by the previous to have the two charges tried together.

[8] The court was of the view that even if the two charges were wrongly heard jointly, so long as the appellant was not prejudiced by the conduct of the case, the court could invoke the provision of s 422 of the CPC in that if the joint trial was irregular, it did not vitiate the trial unless such irregularity has occasioned a miscarriage of justice. In the instant case, the court failed to see that it has occasioned a miscarriage of justice. The appellant was represented by counsel and the appellant was not misled by having the two charges heard together.

[9] The argument by learned counsel was on the charge itself. Learned counsel submitted that the prosecution's case was that the appellant had published a seditious publication on a Facebook page known as 'Alvin and

Vivian-Alvivi' at the address http//www facebook.com/php?fbid=617457598272144&set=a512860642065174.123291.5098 20495702522&type=1 & theatre at 9am on 12 July 2013 in an apartment known as 568-14-18, Kompleks Mutiara, Jalan Ipoh, Batu 31/2, 51200, Kuala Lumpur. The alleged seditious photograph was a photograph with heading 'Selamat Berbuka Puasa (dengan Bak Kut Teh ... wangi, enak, menyelerakan!!'. And containing the logo 'Halal' as well as the words underlined by the prosecution in the Annexure to the charge which were as follows:

> 'Selamat Berbuka Puasa (dengan Bak Kut Teh...wangi, enak, menyelerakan!!' [httpf/www.alvivi.tv/] Izinkan kami memperkenalkan cara kami memupuk semangat 1 Malaysia dengan bertukar-tukar makanan antara kaum-kaum Malaysia pada musim perayaan yang mulia ini. Hak untuk menikmati juadah enak tempatan seharusnya merentasi batasan bangsa dan juga agama. Kepada saudara-saudari yang beragama Islam, selamat berbuka puasa dan Salam Aidilfitri.

[10] Learned counsel submitted that the prosecution has to prove that there has been a publication on the Facebook page entitled 'Alvin and Vivian-Alviv' on the morning of 12 July 2013 and learned counsel conceded that there was a publication on the Facebook page within the meaning of s 2 of the Sedition Act 1948.

[11] As to the *second element of the offence*, learned counsel submitted that there was no evidence that the Facebook greeting was published or uploaded by the appellant or by Tan Jye Yee.

[12] The court has perused the evidence of SP9 who testified that the photographs were recovered from Samsung laptop (exh 19) belonging to Tan Jye Yee. Learned counsel said there was no evidence that the photograph was uploaded or published by Tan Jye Yee. From the evidence SP12 (the complainant) who was attached to the Bahagian Kandungan Komunikasi dan Perkhimatan Post and conducted a surveillance on website. He saw through his computer a Facebook aivivi.swinger showing two individuals with the words 'Selamat Berbuka Puasa' with 'Bak Kut Teh' and at the bottom of it there was a Halal logo. According to SP12 he knows that Bak Kut Teh contained pork. SP12 then reported the matter to MCMC and SP18 from MCMC investigated the complaint and was able to trace the Facebook with Facebook address www.facebook Alvinswinger. SP18 also found that the *Star* online had conducted an online interview with an individual whom was the owner of the Facebook named Alvin Tan. Through SP6 the *Star* online editor and SP6 gave SP18 the handphone number of Alvin Tan. SP18 then contacted Alvin Tan who admitted that he was the Facebook account and had asked Alvin Tan to come MCMC to have his statement taken. SP13 Inspector Seelan had seized from the apartment rented by Tan Jye Yee and among the item seized was a

notebook Samsung (19). The said notebook Samsung (P19) was analysed by SP9 from MCMC and he found a few photographs kept the file 'bak kut teh png' which showed Tan Jye Yee and the appellant and a caption 'Selamat Berbuka Puasa dengan Bak Kut Teh ... wangi , enak , menyelerakan' and the Halal logo. SP9 further stated that the Facebook address was urlhttp/www.facebook.com/alvivi.swingers as administrator. The Facebook account address was registered under the name of 'Alvin & Vivian-Alvivi'.

[13] The court was of the considered view that although no one actually saw Tan Jye Yee or the appellant published or uploaded the Facebook greeting but from the testimonies of the prosecution witnesses all pointed to the fact that the photographs were kept in the file 'Bak kut teh png' in the notebook Samsung belonging to Tan Jye Yee and the Facebook account was registered in Tan Jye Yee and the appellant. The necessary inference which could be drawn from the evidence by the prosecution witnesses that the publication was done Tan Jye Yee and the appellant and the photographs showed both Tan Jye Yee and the appellant together in the photo. There was no evidence to suggest that the notebook Samsung (P19) was used by others. In fact it was kept by Tan Jye Yee at his rented apartment.

[14] The appellant and Tan Jye Yee were charged under s 4(1)(c) of the Sedition Act 1948 and read together with s 34 of the Penal Code which means that they were jointly charged with a common intention. Tan Jye Yee and the appellant were having a relationship as girlfriend and boyfriend and had stayed together in the rented apartment. The appellant's face and Tan Jye Yee appeared in the Facebook photograph showed that the appellant was a willing participant when the Facebook photograph was posted on Facebook.

[15] The learned SCJ on the issue of common intention held that to rely on direct evidence as proof of common intention was quite difficult but it could be inferred from the factual matrix of the case. In the instant case reliance by the learned SCJ was on inferences arising from the conduct of Tan Jye and the appellant in the photographs analysed by SP9 were kept in the file 'bak kut the png which showed Tan Jye and the appellant and the photographs with the caption 'Selamat Berbuka Puasa dengan Bak Kut Teh ... wangi, enak, menyelerakan and with the Halal logo. The learned SCJ found this was sufficient evidence to prove that Tan Jye Yee and the appellant had the common intention to publish or upload the Facebook greetings. The court could not have agreed more with the finding of the learned SCJ on this issue. There was sufficient evidence from the surrounding circumstances that Tan Jye Yee and the appellant had the common intention to publish the impugned Facebook greetings.

[16] As for the *third ingredient of the offence* that is 'seditious tendency'. In

s 3(1)(d) of the Act, a seditious tendency is a tendency to raise 'discontent' or' disaffection' amongst the subjects of the Yang di-Pertuan Agong or the Ruler of any State or amongst the inhabitants of Malaysia or of any state. In s 3(1)(e) of the Act states that a seditious tendency is a tendency to 'promote feelings of ill-will and hostility' between different races or classes of the population of Malaysia.

[17] Learned counsel submitted that there was no evidence from any of the prosecution's witnesses that:

(a) the Facebook publication has any tendency to raise any discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or the inhabitants of Malaysia or of any State; or

(b) the Facebook publication has any tendency to promote feelings of ill-will or hostility between the different races or classes of population in Malaysia.

[18] Learned counsel submitted that the words used in the context of the said publication mean and has the effect of conveying the meaning of a festive greeting in which the writers sought for permission to introduce their way of fostering the 1Malaysia spirit by exchanging food amongst the races in Malaysia and that the right local delicacies should go beyond racial and religious boundaries. It was further contented by learned counsel that it was in this context the writers greeted their readers with the words 'Selamat Berbuka Puasa with Bak Kut Teh' together with the use of a Halal logo. The logo was used to denote the 'halal' (as oppose to haram) nature of the food on display in the Facebook. The defence submitted that there was no evidence to show that the words could not have achieved one or more of the objects specified in s 3(1)(a)–(f) of the Act.

[19] The prosecution submitted that the publication has a tendency to raise any discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or the inhabitants of Malaysia or has a tendency to promote feelings of ill-will or hostility between the different races or classes of population in Malaysia.

[20] The learned SCJ held by reference to *Mat Shuhaimi bin Shafiei v Public Prosecutor* [2014] 2 MLJ 145; [2014] 5 CLJ 22 which stated that determination of what language is considered seditious is a mixed question of law and fact, which was up to the court to decide. To be seditious, the words published should have a tendency to achieve one or more of the objects specified in s 3(1)(a)–(f) of the Act.

[21] The court was of the opinion that the publication has a seditious tendency to promote ill-will and hostility between the races or classes of the population of Malaysia. The evidence that the publication had caused feelings of ill-will or hostility between the different races or classes of population in Malaysia. This was evident from the testimonies of SP2, SP3, SP4, SP8 and SP12 who expressed their anger, frustration, hurt, regret on the action by Tan Jye Yee and the appellant. What was the motive of Tan Jye Yee and the appellant in publishing and uploading on Facebook the photograph with the heading 'Selamat Berbuka Puasa (dengan Bak Kut Teh ... wangi, enak, menyelerakan!!?'. Learned counsel submit that the words used in the context of the said publication mean and has the effect of conveying the meaning of a festive greeting in which the appellant and Tan Jye Yee sought for permission to introduce their way of fostering the 1Malaysia spirit by exchanging food amongst the races in Malaysia and that the right to enjoy local delicacies should go beyond racial and religious boundaries. It was in context the 'writers' greeted their readers with the 'Selamat Berbuka Puasa with Bak Kut The' together with the 'halal' logo.

[22] In the instant case the court agreed with the finding of the learned SCJ that the publication on the Facebook has a seditious tendency to promote feelings of ill-will or hostility between the different races or classes of population in Malaysia.

[23] Learned counsel submit that the learned SCJ had taken into account a provision relating 'to promote feelings of ill will, hostility or hatred between persons or groups of persons *on the ground of religion*'. This according to learned counsel was evident from the judgment written which made reference to the feelings of the Muslim community rather than races or classes of population in Malaysia such as Malays, or Indian Muslim. The charge against the appellant was pursuant to s 4(1)(c) of the Act and for purposes seditious tendency is as stated in s 3(1)(e) 'to promote feelings of ill-will and hostility between the races or classes of the population of Malaysia'. Learned counsel further submit that s 3(1)(c) of the Act does not refer to religion. In the amended Act which came into force on 28 May 2015 an amendment to s 3(1)(c) was made to specifically made reference to religion which amended s 3 of the principal Act by inserting after para (e) the following paragraph:

> (ea) to promote feelings of ill-will, hostility or hatred between persons or group of persons on the ground of religion;or

[24] This issue was not raised in the petition of appeal by the appellant but nevertheless the court will state that perusing the judgment of the learned SCJ, reference was made to races or classes of the population of Malaysia as it could be gleaned from the judgment at p 52 of the appeal record *Jld* 1 which state as follows:

Saya mendapati paparan beserta catatan yang terdapat dalam P5 tersebut boleh mengundang dan mengembangkan niat jahat dan permusuhan antara golongan penduduk yang berlainan di Malaysia khusus nya umat Islam.

The court was of the view that the reference to 'khususnya umat Islam' did not vitiate or nullify the finding of the learned SCJ.

[25] The court upon reading the appeal record and the ground of judgment on conviction and also read the written submissions and after hearing further oral submissions from both parties, found that the learned SCJ had considered the correct principle of law based on the testimonies of the prosecution and the defence witnesses and hence no appellate intervention on conviction was necessary. The court dismissed the appeal on conviction and affirmed the decision on conviction by the learned SCJ.

APPEAL ON SENTENCE

[26] The appeal on inadequacy of sentence was by the prosecution. In the petition of appeal on sentence the prosecution stated that the learned SCJ had erred in law and fact in failing to take into account the seriousness of the offence committed by the appellant. The prosecution further submit that the term of imprisonment meted out on the appellant of five months and 22 days was not deterrent enough to prevent similar offence being committed by others. The learned SCJ in his judgment on sentence had considered that the offence committed by the appellant was a serious offence which could promote feelings of ill-will or hostility between the different races or classes of population in Malaysia. Having acknowledged the seriousness of the offence committed by the appellant, the learned SCJ went on to considered the punishment provided for as stated in s 4(1)(c) of the Act, that 'Any person who ... shall be guilty of an offence and shall, on conviction be liable for a first offence to a fine not exceeding five thousand ringgit or to imprisonment for a term exceeding three years or both and for subsequent offence ...'.

[27] The learned SCJ was of the view that since the offence committed by the appellant was serious, an imprisonment sentence would be an appropriate punishment meted out on the appellant. The court would think that an appropriate sentence to be meted out on the appellant would be to impose a maximum fine of RM5,000 taking into account that the appellant was a first offender as far as the charge was concerned. It would be more appropriate to sentence the appellant to an imprisonment sentence if she commits a subsequent offence. Furthermore Tan Jye Yee, the co-accused in the charge had absconded while the appellant appeared in court to answer the charge. In this respect, the court would tamper justice with mercy by setting aside the imprisonment sentence and substituting it with a maximum fine of RM5,000 in default six months imprisonment. The appeal on sentence by the

A prosecution is dismissed and the court invoked its inherent power to set aside the sentence of imprisonment and substituted it with a maximum fine of RM5,000 in default six months imprisonment.

Order accordingly.

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Reported by Mohd Kamarul Anwar

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